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Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

WAYNE PEARCE, :
Plaintiff-Appellant, :
vs. : Case No. 18,376
MARTIN J. WISTISEN and :
RICHARD OVESON, :
Defendants-Respondents. :

BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENT OF THE FOURTH
JUDICIAL DISTRICT COURT IN AND FOR UTAH
COUNTY, HONORABLE ALLEN B. SORENSEN PRESIDING

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Clerk, Supreme Court, Utah

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BRIEF OF APPELLANT

NATURE OF THE CASE

This is a wrongful death action by Wayne Pearce, the father of the deceased, Evan Pearce, against the defendants Martin J. Wistisen and Richard Oveson, for damages arising from the wrongful death of Evan Pearce during a boating excursion on Utah Lake.

DISPOSITION IN THE LOWER COURT

The case was tried before the Honorable Allen B. Sorensen with a jury, on the 7th, 8th, 9th, and 10th days of December, 1981. The jury delivered a special verdict on December 10, 1981. (R. at 194.) On December 23, 1981, in accordance with the verdict of the jury, the court ordered that plaintiff recover nothing from defendants, and that defendants recover of plaintiff their costs. (R. at 207.)

Plaintiff filed his motion for a new trial on December 17, 1981. (R. at 206.) The court denied plaintiff's motion for a new trial by its order filed March 26, 1982. (R. at 234.) A notice of appeal was filed on April 15, 1982. (R. at 240.)

RELIEF SOUGHT ON APPEAL

The appellant requests that this Court reverse the lower court's decision and remand on the issue of damages, or, in the alternative, remand the case for a new trial.

STATEMENT OF FACTS

Plaintiff in this case is the father of the deceased, Evan Pearce. The plaintiff is suing for and on behalf of the heirs of Evan Pearce. Evan Pearce drowned in Utah Lake sometime between 7:00 p.m., June 1, 1979 and 5:00 a.m., June 2, 1979.

At the time of his death Evan Pearce had just graduated from Timpview High School in Provo, Utah. The incidents which led to his untimely death occurred the day after his high school graduation ceremony.

Evan was in excellent health and was in extremely good physical condition at the time of the accident which claimed his life. He was an accomplished tennis player and was at times nationally ranked in his age group. (R. at 490.)

Evan was the oldest of the three children in the Pearce family. He had a very close relationship with his younger brother and sister. (R. at 376.) He competed in doubles tennis with both his younger brother and sister and was an invaluable training partner and assistant for them. (R. at 377.) He and his family traveled extensively in connection with their athletic activities. This resulted in a close and confiding relationship between the deceased and his parents. (R. at 378.)

The incidents which caused Evan's drowning occurred during a boating excursion on Utah Lake. Evan Pearce and Kevin Wistisen,

the minor child of defendant Martin J. Wistisen, formulated plans for the boating trip while returning from a graduation party that had been held in Provo Canyon on June 1, 1979. (R. at 405.)

On the morning of the accident, Evan Pearce was in a good mental and physical state. Testimony at trial indicated that he was not tired and was not debilitated either mentally or physically; that he felt strong and eager for the days activities. (R. at 402-403, 527-528.)

With both counsel present in chambers, counsel for plaintiff made a motion in limine as to any reference to Evan's consumption of alcohol on the night and early morning preceding the evening of the drowning. (R. at 263.) Plaintiff was not informed of the defendants' intention to introduce such testimony or the identity of the witness who would so testify until the Friday (June 4) preceding the Monday (June 7) when the trial commenced. Plaintiff's argument in support of the motion in limine was that any consumption of alcohol which may have occurred was remote in time, irrelevant, and that its sole purpose was to inflame and prejudice the jury. Additionally, it was argued that the testimony was an unfair surprise. (R. at 263-264.) The court ruled against plaintiff's motion in limine and conceded that "it may be error, Mr. Howard, but I have ruled." (R. at 264.) Counsel for the defendant admitted that neither he, nor the witness who was to testify about the drinking, knew how much alcohol was in Evan Pearce's system, if any, and that there was no way of determining it. (R. at 258.)

The defendants did introduce testimony at trial to the

effect that Evan had been involved to some degree, in drinking beer at the graduation party which had ended more than twelve hours prior to the events in question. (R. at 545, 548.) Counsel for plaintiff made a timely objection that the testimony was irrelevant, immaterial and that any probative value was outweighed by its prejudicial nature. (R. at 545.)

The plaintiff in order to rebut the prejudicial testimony, was forced to introduce evidence that the plainff's consumption of alcohol was limited and that the time of last consumption was not later than 5:30 a.m. the day of the accident. (R. at 401, 402.) This was more than thirteen hours prior to the time of the beginning of the events leading to the fatality. (R. at 336.)

The boat in question was owned jointly by the defendants. (R. at 311, 642.) Each defendant testified that he had a 50% ownership in the boat and that both defendants and their families shared in its use. Mr. Wistisen gave permission for Kevin Wistisen to take the boat on the day of the accident. (R. at 405.)

Testimony of experts at trial indicated that the following equipment is required to be kept in a boat the size of the one involved in the accident:

1. One life jacket per person of proper size so it can be worn effectively.
2. One ring buoy or throwable device.
3. Running lights on the boat.
4. An oar or paddle.
5. A horn.

These are the items, the lack of which would result in the issuance of a citation. (R. at 451-455, 459.)

Prior to leaving his house with the boat, Kevin Wistisen "cleaned up" the boat by removing equipment such as paddles and

life preservers. (R. at 407, 436.) Testimony at trial established that when the boat was on the water at the time of the emergency it did not have the following statutorily required items:

1. Paddles or oars.
2. Sufficient life jackets for the number of people aboard the boat.
3. A ring buoy or throwable device.
4. Functional lights. (Kevin Wistisen had cut off all electrical power in the boat before leaving it, and had failed to give the girls remaining on board any instructions as how to make the lights functional.)
5. It is disputed as to whether a horn was present on board.

(R. at 368-375, 343, 407, 409.)

An anchor is statutorily required when a boat is unbeachable. There was some difference of opinion on the issue of the beachability of the boat in question, with one expert indicating that in a windstorm, the boat would not be beachable on Utah Lake. This would mean that without an anchor, the boat was subject to being cited for the lack of an anchor on board. (R. at 468.) The experts who were not of the opinion that the lack of an anchor would subject the boat operator to a citation, were in agreement that it would be an "essential" piece of equipment on a boat of that size. (R. at 477, 612.) The experts also testified that a safety flare, which the boat in question did not have at the time of the accident, was "essential", although not required by statute. (R. at 609.)

In the early afternoon of July 1, 1979, Kevin Wistisen picked up Evan Pearce, Leslie Pearce, and Angela Adams who were the other participants in the activity. They proceeded to the Provo Boat Harbor and launched the boat at approximately 5:00 p.m. (R. at 406.)

The group proceeded in the boat to the west side of Utah Lake and both Evan Pearce and Leslie Pearce waterskied. (R. at 364.) The group stayed on the west side of the lake until early evening at which time they started back to the boat harbor with Evan Pearce skiing behind the boat. (R. at 365.)

By this time a wind had come up and the water had become quite choppy. Evan fell after hitting some large waves. (R. at 366.) After Evan fell, Kevin Wistisen turned the boat to the left and ran over the ski rope while making the turn to retrieve Evan Pearce from the water. (R. at 346, 366.) Expert testimony at trial established that regulations exist which require the operator of a boat to approach a fallen waterskier from the driver's side of the boat. The driver's side of the boat in question is on the right. (R. at 473.) Both Angela Adams and Leslie Pearce testified that Kevin Wistisen turned the boat to the left, not to the driver's side, to pick up Evan Pearce. This would constitute a violation of the regulation. Defendant admitted running over the rope but denied making an improper turn.

Running over the rope in this manner caused it to become entangled in the propeller and prevented the engine from operating. (R. at 366.) Kevin Wistisen raised the outdrive and attempted to untangle the rope from the propeller. (R. at 366.) He was unable to do so from inside the boat, so he lifted the engine cowl and switched off all electrical power in the boat, put on a life jacket, and without giving any instructions to the two girls as to the operation of the boat or location of any emergency equipment in the boat, he entered the water to attempt to remove

the tangled rope. (R. at 367-368.) Neither of the girls in the boat had any previous experience or instruction in the operation of a boat, nor were they adequately prepared to handle the emergency which developed. (R. at 336.)

While these events transpired Evan Pearce was still in the middle of the lake three miles from closet shore. The boat was approximately two miles from the closet shore. (R. 427.) Because of the strong wind which had developed that afternoon, the boat was being blown away from Evan. (R. at 409.) Evan tried to swim to the boat, but was impeded by the life jacket he was wearing. In an effort to get to the boat before it became completely unreachable, Evan took off his life jacket and tried to swim to the boat. (R. at 368.) Because of the rate at which the boat was being driven by the wind, Evan was unsuccessful in his attempt to reach the boat. (R. at 368.) The two girls who were still in the boat, Leslie Pearce and Angela Adams, informed Kevin Wistisen of Evan's plight. Kevin then swam back toward Evan while holding onto the ski rope that trailed out behind the boat. (R. at 369.) While Kevin was holding the end of the rope and reaching for Evan, the rope broke leaving both boys stranded in the lake. Kevin made an attempt to swim to the boat, but because of the wind he was unable to reach the boat. (R. at 370.) Kevin then swam back to where Evan was. Evan yelled to the girls in the boat asking them to throw him a life jacket. (R. at 370-371.) Because the boat was not properly equipped, in that it had only three life jackets for four people, there was only one jacket remaining in the boat. (R. at 407.) Leslie Pearce then threw

out the only remaining jacket to Evan and he was able to reach it. The jacket that was thrown out was the blue jacket that was not large enough to fit a person of Evan's size and Evan was, therefore, unable to zip it up the front even though he did put it on. (R. at 411, 426.) The jacket, therefore, was open in the front by four or five inches and supported the body only in the shoulders and the back. Because the jacket was too small and would not zip ut, it forced the user to wear it in such a precarious way that it subjected him to the possibility of slipping out of, or though it.

The boat was by now some distance from the boys in the water, and the boys were unable to communicate to the girls any instructions as to the operation of the boat. (R. at 371.) The boat at this time was in about nine to ten feet of water. (R. at 442.) The girls looked for an anchor to stop the boat from drifting. They also searched for a paddle with which to manuever the boat. (R. at 372.) No such equipment was on the boat. (R. at 372, 4-7.) The boat continued to drift until it was completely separated both visually and audibly from the boys stranded in the water. (R. at 673.)

The boys decided to swim to the west shore. (R. at 426.) Although this was the closet shore, they were still several miles out. (R. at 427.) After it became dark the boys were separated and that was the last time Evan Pearce was seen alive. (R. at 415, 427.)

Kevin Wistisen was able to reach the shore almost five hours later and phoned his home to inform his parents of the incident.

(R. at 414.) A Utah County Sheriff then came and picked Kevin Wistisen up on the west shore and took him back to the Provo Boat Harbor where his family and others were waiting. (R. at 415.)

During this same evening the families of the youngsters in the boat became worried and went to the boat harbor to investigate. The truck and boat trailer driven by Kevin Wistisen were there, it was now dark and the boat had not returned. Another boat with Wayne Pearce, Evan Pearce's father, went out to search. They found nothing and returned to the boat harbor to learn that Kevin Wistisen had been found. (R. at 495.) At this time the sheriffs department actively joined in the search. (R. at 496.) It was not until the next morning at approximately 5:00 a.m. that the boat with the two girls was found. (R. at 376, 499.) The two girls, although extremely cold and frightened, were otherwise safe when picked up by the boat from the Department of Parks and Recreation. A helicopter search that same morning resulted in the location of the two life jackets, the yellow one Evan Pearce had on when he was waterskiing, and the blue one he was thrown that did not fit and would not zip up. (R. at 499.) When the blue life jacket was found the certainty of the young man's fate became a reality for his parents and those conducting the search.

Search efforts continued throughout the week, but the remains of Evan Pearce were not found until approximately eight days later. (R. at 499.)

At the close of evidence, counsel for plaintiff made a motion for a directed verdict in regard to liability or negligence on the grounds that:

1. Defendants' negligence had been established by clear and convincing evidence, or in the alternative;
2. That defendants were negligent as a matter of law and that such negligence was the proximate cause of the death of the decedent, or in the alternative;
3. That defendants were negligent as a matter of law and that the case should be submitted to the jury on the issue of whether such negligence was the proximate cause of the death of the decedent.

(R. at 660-662.) The court denied plaintiff's motion. (R. at 670.)

Plaintiff objected to and took exceptions to the jury instructions given by the court as follows:

1. The instructions did not adequately instruct the jury as to the theory of the plaintiff's case.
2. Instruction 10 refers to life expectancy, and the court did not give the jury a life expectancy instruction.
3. Instruction number 11 is error because it refers to a reasonable discount without considering inflationary rates.
4. Instruction 12 is error because it is a double instruction in that it gives double emphasis to defendants' theory of the litigation.

(R. at 673-674.)

Plaintiff objected to the failure of the court to give his requested instruction 19 on damages. (R. at 675.) Plaintiff also objected to the failure of the court to give the requested instruction 1, regarding plaintiff's theory of the case, instruction 6, regarding the statutory liability of one who owns a boat and entrusts it to a minor; instruction 7, regarding the statutory duty of the owner of a motorboat to equip it with certain minimum safety devices; and instruction 13, regarding the presumption that the deceased was exercising due care for his safety. (R.

at 675-676.)

Plaintiff objected to the verdict form because it submitted the question of damages in a general way and not as to each of the heirs. (R. at 674-675.)

ARGUMENT

POINT I

THE COURT'S FAILURE TO GIVE PLAINTIFF'S REQUESTED INSTRUCTION NUMBER 6 ON IMPUTED LIABILITY UNDER UTAH CODE ANN. §73-18-18 WAS ERROR.

In the present case, the only defendants were the joint owners of a motorboat which was being driven and which was under the control of the minor son of one of the defendants. Plaintiff's theory of the case was that the defendants were vicariously liable for the negligence of the minor who operated the boat with the consent of the owner. The only way that the plaintiff could successfully proceed against the defendants was on the basis of vicarious liability because the defendants themselves had no direct participation in the events which led to the fatality of Evan Pearce.

At trial, the plaintiff presented evidence as to the defendant's ownership of the boat. It was undisputed that Kevin Wistisen, at the time of the incident, was a minor and that he had possession of and was operating the boat with the express consent of one of the owners, and with the implied consent of the other owner.

In order to instruct the jury as to that theory, the plaintiff requested the following instruction:

You are instructed that the law of the State of Utah, Utan Code Ann. §73-18-18, provides

as follows:

The owner of a vessel shall be liable for any injury or damage occasioned by the negligent operation of such vessel by a minor under the age of eighteen years operating such vessel with the express or implied consent of the owner, whether under the laws of this State or by neglecting to observe such ordinary care and such operation as the rules of common law require.

Therefore, if you find that Kevin L. Wistisen was negligent in the operation of the boat, either in regard to violation of one of the laws of the State or by his failure to exercise ordinary care, caution and prudence, and that such negligence was the proximate cause of the death of Evan Pearce, then you shall find in favor of the plaintiff and against the defendants.

The trial court failed to give that instruction and the plaintiff made a timely objection to said failure.

The instructions given by the court which bear some relation to the liability of the owners of the boat are contained in Instructions Number 5 and 6. (R. at 178-180.) Instruction Number 5 states only, "the plaintiff has the burden of persuading you that the defendants Martin J. Wistisen and/or Richard Oveson and/or the boat operator Kevin Wistisen was negligent [sic]. . ." While Instruction Number 6 does indicate that the owners of a boat are required to have it equipped with necessary safety equipment, the instruction repeatedly refers to the responsibility of the operator to have that equipment and not the owners. The instruction says nothing about any liability of the owners for the negligence of the minor operator of the boat. The reference of the instruction to the duty of the owners to keep equip-

ment on the boat was ineffective in view of the facts presented at trial indicating that the minor son of the defendant Wistisen took what few safety equipment items were owned by the defendants out of the boat.

Utah Code Ann. §73-18-18 (1980), establishes the propriety of the requested instruction number 6 as a matter of law. The failure to give the instruction, was error, in that, the only impression that could be drawn by the jury was that the imputed negligence of the owners was not the law or the view of the court.

In the case of Watters v. Querry, 626 P.2d 455, 458 (Utah 1981), this court discussed the issue of the trial court's obligation to submit the theory of a party to the jury if there is evidence adduced in support thereof. In its holding, the court stated as follows:

The well-recognized general rule entitles a party to have his theory of the case submitted to the jury. Where there is evidence adduced to support a party's theory of the case, it is prejudicial error for the trial court to fail to instruct thereon.

With respect to vicarious liability, it was absolutely essential that the instruction be given, at least in substance, as requested by the plaintiff. This is so, because there were several acts of negligence by Kevin Wistisen which more directly contributed to the fatality than others. Unless the jury were to know that the owners were responsible for all acts of negligence by Kevin Wistisen, the jury might, as they did in the present case, find that any negligence of the named defendants was not a proximate cause of the fatality in question.

The principal acts of negligence by Kevin Wistisen were removing the required safety equipment from the boat prior to the excursion, causing the rope to become entangled in the propeller mechanixm, and leaving the two girls in the boat completely uninstructed in the operation thereof with the power having been disconnected. These negligent acts, singly or in combination, were the proximate cause of the death of the decedent, Evan Pearce. Because there was no instruction imputing liability for these negligent acts to the named defendants, the jury was only able to consider the named defendants' independent negligence which was found not to be the proximate cause of the injuries.

Unless the Court should find that other instructions presented the plaintiff's theory in regard to vicarious liability, the holding in the Watters case requires a finding that the failure to give instruction number 6 was prejudicial error and grounds for reversal.

POINT II

THE PLAINTIFF WAS SUBSTANTIALLY PREJUDICED BY THE ERRONEOUS ADMISSION OF EVIDENCE CONCERNING ALCOHOL CONSUMPTION BY THE DECEASED, EVAN PEARCE.

Rule 4 of the Utah Rules of Evidence states the law concerning the erroneous admission of evidence:

A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence, unless (a) there appears of record objection to the evidence timely interposed and so stated as to make clear the specific ground of objection, and (b) the court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the grounds stated and probably had a substantial influence in bringing about the

verdict or finding. However, the court in its discretion, and in the interest of justice, may review the erroneous admission of evidence even though the grounds of the objection thereto are not correctly stated.

In the present case, the court erroneously allowed the defendants to introduce two separate items of evidence which had substantial influence in bringing about the verdict of no cause of action against the plaintiff. Those two items of evidence were testimony concerning the illegal purchase of an alcoholic beverage by the plaintiff and testimony concerning the plaintiff's consumption of alcoholic beverages many hours prior to the events which led to his death. That testimony was given by Mr. Rod Hunt who had accompanied the deceased on the evening and morning preceding the evening of the accident. The plaintiff was not aware of the identity of that witness until the Friday preceding the Monday which commenced trial. The plaintiff had no opportunity to depose that witness or prepare adequately for cross-examination.

Once the plaintiff discovered that the defendants intended to introduce such evidence, the plaintiff made a motion in limine to prevent the introduction of said evidence. The motion in limine was denied, and the plaintiff thereafter made timely and specific objections to the admission of said evidence in the course of the trial. The objections presented by the plaintiff in its motion and at trial were that the evidence was remote in time, irrelevant, unduly prejudicial, and constituted unfair surprise.

Rule 1(2) of the Utah Rules of Evidence defines "relevant

evidence" as that evidence "having any tendency in reason to prove or disprove the existence of any material fact." The evidence concerning the purchase and consumption of the alcohol by the deceased was irrelevant because it did not tend to prove the only affirmative defense raised by the defendants relating to contributory negligence.

Negligence has been defined by this Court to mean "breach of a duty to use due care under the circumstances of the situation." Wheeler v. Jones, 19 Utah 2d 392, 431 P.2d 985, 988 (1967). In order to be admissible, the evidence would have to tend to prove that by reason of the consumption of alcohol, the decedent, Evan Pearce, was unable to exercise due care for his own safety. The defendants utterly failed to show any causal connection between the purchase or consumption of alcohol and any lack of due care for his own safety by the decedent. Mr. Hunt was not present during any of the events surrounding the water skiing excursion in question and none of the other witnesses testified as to any observable signs of drinking or intoxication on the part of the decedent.

Counsel for the defendants was perfectly aware of his inability to relate the drinking to any recognizable standard or to actual observable physical impairment. This is indicated in the following statement in chambers to the Court:

Now let me be totally candid and above board with the Court. I have talked with Newell Knight, I have talked with the State Toxicologist, in an effort to try and determine the amount of alcohol in this boy's system when the accident occurred, based on the testimony of Rod Hunt. The truth of the matter is they can't be very helpful unless the amount of alcohol is more correctly quantified. And

Rod Hunt cannot do it. I believe, though, Judge, that the jury has the right to know what happened the night before, and even though we don't have any scientific evidence that might suggest the amount of alcohol in the system, there is enough experience that jurors would have that they could draw their own conclusions.

(R. at 258.) The court's response to Mr. Hansen's statement was, "You are over estimating jurors in this county." (R. at 258.)

The plaintiff respectfully submits that evidence concerning the consumption of alcohol is irrelevant unless it can be related to a specific blood alcohol level, intoxication or some observable effect of alcohol upon the person. The defendants were unprepared to present such causal relation, the court knew that they would be unable to do so during the preliminary motion to exclude the evidence and the defendants during the trial were never able to show any causal connection between the evidence and any negligence on the part of the plaintiff's decedent. The jury was simply left to draw such inferences as they might from the illegal purchase and the consumption of some unknown quantity of alcohol without any guidepost or reference point. The only effect of said evidence was to prejudice and inflame the jury.

It is well known that the predominant religion in Utah County is the Latter-Day Saint Faith. That faith categorically proscribes the use of alcohol by its members and does it in such a way as to equate it with sin and misconduct. The ingrained abhorrence of such misconduct by members of that faith is such as to have easily prejudiced the jury against the plaintiff. To allow such testimony without any causal connection between the use of alcohol on the evening before the accident and the drowning

incident which claimed the life of Evan Pearce was to introduce an inflammatory, prejudicial and indefensible proposition to the jury. The plaintiff had no way of countering such highly prejudicial testimony, and any effort to rebut such testimony would simply serve to emphasize the point to the jury.

Every case which discusses the issue of the relevancy of evidence of "intoxication" with respect to contributory negligence, refers to the legal term "intoxication" or to a specific blood alcohol content. Plaintiff readily concedes that had the defendants been able to show intoxication or some specific blood alcohol level or even some observable signs of impairment, the evidence would have been relevant and admissible.

It is not difficult to understand why there was no evidence of observable impairment on the part of Evan Pearce in view of the well known scientific fact that individuals eliminate alcohol from the body at the rate of .015% of blood alcohol in the system every hour. This means that over a period of twelve hours, an individual with a .18% blood alcohol level would eliminate all alcohol from his body.

In Bach v. Penn Central Transportation Co., 502 F.2d 1117 (6th Cir. 1974), a railroad fireman was killed by a moving train while working as an employee of the defendant. The executrix of the defendant's estate sought to recover for the death under the Federal Employer's Liability Act. During the trial the defendants introduced evidence to the effect that plaintiff's decedent had been drinking some time previous to the accident. Plaintiff maintained that the drinking was too remote in time and was

therefore inadmissible. In ruling on the admissibility of the evidence that the decedent had been drinking the court held:

Clearly, testimony tending to show that the decedent had been drinking before a fatal accident is generally relevant to the jury's consideration of contributory negligence Yet the relevance of such evidence disappears if the drinking occurred so long before the accident that the alcohol could no longer have any effect on the decedent's conduct. The probative value of such evidence must be closely scrutinized to avoid the possibility of prejudice to the party charged with negligence. In this case particularly in view of the testimony of appellee's expert Martin that any alcohol consumed by the decedent in Cincinnati on Thursday night and early Friday, would not still be in his blood at the time of the accident on Saturday evening, references to the so-called Cincinnati drinking should not have been received or should have been stricken. The same is true with respect to the ambiguous references to Wild Turkey Bourbon. This evidence was much too remote and uncertain to be of probative value on this issue of contributory negligence.

502 F.2d at 1121 (Emphasis added).

The time frame in the instant case, is identical to that described in the Bach case above and the denial of plaintiff's motion in limine cannot be dismissed as harmless error as the ruling in that case properly states as follows:

As the evidence is convincing that the decedent, whether drunk or sober, was guilty of a high degree of negligence in sitting on a rail, knowing that the train was soon to return, his head down resting on his hands and knees oblivious of this impending doom despite the train's continuous whistle and other sounds, can it be said that the court errs in charging the Ohio Statute and in admitting the challenged evidence of drinking were harmless? We think not. This is true primarily because under the F.E.L.A. the issue was not negligence alone but comparative negligence as between the decedent and the railroad. . . . The jury's responsibility was to fix the degree of negligence of each party. We are unable to say that the erroneous rulings on the drinking issue were simply innocuous and played no part in causing

the jury to find the decedent 80% negligent rather than say, 50% or 60% or some other percentage less than 80% negligent.

502 F2d at 1121-1122.

Assuming arguendo that the evidence was relevant, there is a further determination to be made as to its admissibility pursuant to Rule 45 of the Utah Rules of Evidence which states as follows:

Except as in these rules otherwise provided, the Judge may in his discretion exclude evidence if he finds that its probative value is substantially outweighed by the risk that its admission will (a) necessitate undue consumption of time, or (b) create substantial danger of undue prejudice or of confusing the issues or of misleading the jury, or (c) unfairly and harmfully surprise a party who has not had reasonable opportunity to anticipate that such evidence would be offered.

The recent case of Terry v. Zions Co.-Op. Mercantile Institution, 605 P.2d 314 (Utah 1979), discusses in detail the application of the above cited evidentiary rule in cases such as that presented to the Court. In the Terry case, the trial court limited the introduction of evidence of the plaintiff's prior arrest and conviction for shop lifting. The defendant argued that since the plaintiff's claim was to the effect that the subject matter detention and arrest caused her severe emotional distress and damaged her reputation, it should be allowed to present evidence concerning the nature and substance of the prior conviction. The trial court refused to allow such evidence and in affirming the decision, this Court said:

Although the relevancy of the proffered evidence is crucial, the probative value of the evidence, standing alone, does not determine its admissibility. . . . This principle has been codified in Rule 45, Utah Rules of Evidence, . . . The trial judge effectuated this protection by restricting the evidence

admitted to the fact of the prior act and the identity of the party involved. In his decision to exclude the substantive effects of the incident, the trial judge took into consideration the delay and confusion that would result from a re-trial of the prior conviction, the remoteness of the prior act, and the tendency the proffered evidence would have to mislead and prejudice the jury.

605 P.2d at 322 and 323 (emphasis added).

Concededly, the determination as to undue prejudice is one to be made by the trial court in its discretion. The facts of the present case show that the trial court clearly abused its discretion in allowing the admission of the evidence in question.

In analyzing the exercise of discretion by the court, it is important to note that if the evidence concerning the consumption of alcohol were not sufficient error by itself, the court allowed the defendants to compound the error by presenting testimony over objection that the alcohol had been illegally purchased by the decedent. It is axiomatic that such evidence is irrelevant and could only relate to the decedent's bad character. The only purpose of such testimony is to influence and prejudice the jury.

The mischief of allowing such testimony is to introduce a shadow defense for which the plaintiff cannot respond. Analogous to the circumstance is the Dead Man's Statute, Utah Code Ann. §78-24-2(3)(1977), which would have prohibited this type of testimony wherein the only rebutting testimony was possessed by the decedent. While the Dead Man's Statute is not in point as a matter of subject, it is in point in regard to the spirit of the law regarding fair play.

The result of the court's denial of plaintiff's motion in limine was to allow the defendants to demean and besmirch the

reputation of the decedent by implying that some significant orgy had occurred the night before the accident, and that the decedent was a participant. The very nature of the testimony placed the decedent among a class of people generally rejected in the philosophic view of the majority of the people in Utah County. While one does not know the religious and philosophic convictions of the jury, in light of the religious demographics of the area from which the jury was drawn, it is not hard to envision that all or at least a significant portion of the jury subscribed to the beliefs of the predominant religious denomination.

Based on the above-cited authority and analysis it is clear that the court's admission of evidence regarding consumption of alcohol by the decedent, Evan Pearce, was unduly prejudicial and reversible error.

POINT III

THE FAILURE OF THE COURT TO GIVE PLAINTIFF'S REQUESTED INSTRUCTION NUMBER 13 REGARDING THE PRESUMPTION THAT EVAN PEARCE WAS EXERCISING DUE CARE FOR HIS OWN SAFETY WAS ERROR.

The instinct of self-preservation and the known disposition of man to avoid injury and harm to himself are common knowledge. Demille v. Erickson, 23 Utah 2d 278, 462 P.2d 159 (1969), Haman v. Prudential Insurance Co. of America, 415 P.2d 305, 310 (Idaho 1966); Hooton v. City of Burley, 70 Idaho 369, 219 P.2d 651 (1950); Staab v. Rocky Mountain Bell Telephone Co., 23 Idaho 314, 129 P. 1078 (1913). Based on said instincts a presumption arises which the courts have presented to juries by way of instruction.

In Demille v. Erickson, 23 Utah 2d 278, 462 P.2d 159, 161 (1969), plaintiff maintained a wrongful death action against

defendant as a result of a head-on collision on a highway. In ruling on the issue of the presumption that an individual exercises due care for his or her own safety, the Supreme Court of Utah held:

There was a presumption, based upon the instinct of self-preservation, that the deceased, Spendlove, was exercising due care for his own safety; this presumption may take the place of evidence sufficient to make a positive finding in the absence of other evidence.

The court in Demille concluded that the presumption was rebuttable upon the establishment of a prima facia case by the opposing party and that it is a question for the court whether such prima facia case has been established. 462 P.2d at 161.

In the instant case it is impossible to conclude, based on the record, that the defendants established a prima facia case sufficient to rebut the presumption. Testimony at trial indicated that Evan Pearce made every effort to get back to the boat after the rope became entangled in the propeller mechanism. (R. 349-352, 366-369.) Except while making a final effort to reach the boat he wore a life jacket at all times. He was neither passive nor indifferent in his attempts to secure his own safety, but rather, made all conceivable efforts in that regard.

In Haman v. Prudential Insurance Co. of America, 415 P.2d 305, 310-311 (Idaho 1966), a life insurance beneficiary brought an action against the insurer for the benefits of the policy. In holding that the lower court's jury instruction on presumption of the decedents due care for his safety was proper, the Supreme Court of Idaho stated:

As to the evidentiary and procedural effect of such presumption, this court has held the presumption of due care creates a prima facie case of due care upon the part of the person killed. . . if insufficient evidence is presented by the party against whom the presumption operates, the presumption will entitle the party relying on it to judgment.

The court in Haman outlined the analysis to be followed when evidence is presented contrary to the presumption:

In Department of Finance v. Union Pacific Railroad Co., 61 Idaho 484, 104 P.2d 1110 (1940), it was held that if reasonable minds might differ as to the conclusions to be drawn from the evidence opposing the presumption the matter should be submitted to the jury, and the jury informed as to the presumption, quoting from Geist v. Moore, 58 Idaho 149, 70 P.2d 403 (1937), as follows:

. . . and in the following cases this court had definitely committed itself to the doctrine that where there is a conflict between the presumption and contrary evidence, from which reasonable minds might draw different conclusions, it is proper to instruct the jury as to the presumption.

415 P.2d at 311 (emphasis added).

The record in the instant case shows little, if any, evidence indicating that Evan Pearce was not exercising due care for his own safety. In fact, the testimony on record indicates that he was at the time of the emergency, endeavoring to secure his safety and well being. If the evidence was such that reasonable minds might draw different conclusions, it was not only proper, but also required that the instruction be given, together with any necessary instructions concerning presumptions and rebuttal of presumptions.

Based on the authority cited above, plaintiff was entitled

to a jury instruction that he was exercising due care for his own safety and the court's failure to so instruct was error.

POINT IV

THE FAILURE OF THE COURT TO INSTRUCT THE JURY AS TO THE STATUTORY REQUIREMENT OF AN ANCHOR ABOARD THE BOAT IN ISSUE WAS ERROR.

In Watters v. Querry, 626 P.2d 445 (Utah 1981), as discussed in Point I, the Utah Supreme Court held that where a party introduces evidence in support of its theory of a case, that party is entitled to have that theory submitted to the jury and that failure by the court to submit the theory constitutes prejudicial error.

In the instant case, a portion of the plaintiff's theory of the case was that an anchor on the boat in question was statutorily required. The law is, in pertinent part: "All vessels except those capable of being safely beached shall be equipped with an anchor and line of sufficient weight and length to securely anchor such vessel." Utah Code Ann., §73-18-8 (1980); 4 Utah Admin. R. §A60-01-3(3)(b)(12) (1975).

The evidence introduced by plaintiff was by expert witnesses at trial who indicated that during a wind storm on Utah Lake, a boat of the size and type in question would not be beachable and would, therefore, require an anchor on board to be in compliance with Utah law. (R. at 468.) The absence of an anchor on board was well documented by testimony at trial. (R. at 38, 373-374, 407.)

Whether the law required an anchor to be aboard the boat may, arguendo, be debatable depending on whether the boat is

"beachable." One expert, Mr. Larry Davis, said it was not, (R. at 468), and one expert, Mr. Tuttle, said it was. (R. at 627.) Both, however, said an anchor was essential. Furthermore, the State of Utah, through its recreation department, had established safety standards, the departure from which would be negligence. Those standards were introduced into evidence and categorically stated that for this boat an anchor was an essential piece of safety equipment. The failure to have one aboard was negligence, especially in this case. The lake had a mean depth of 9 feet. (R. at 442.) An anchor with a rode (length) of 30 feet would have been totally effective in preventing the drift of the boat and would have saved the life of Evan Pearce.

Plaintiff maintains, as part of his theory of the case, that under the conditions that prevailed on Utah Lake at the time of the emergency, the lack of an anchor on board the boat constituted negligence on the part of the defendants. Plaintiff supported his theory by evidence adduced at trial as required by the general rule in Watters. In view of the holding in Watters and the evidence introduced at trial, plaintiff is entitled to have his theory of the case submitted to the jury. The court's failure to give such an instruction to the jury would cause the jury to believe that the lack of an anchor was not a violation of law and that the defendants were not negligent in that respect.

Apart from the statutory aspect discussed above, plaintiff submits that rules and regulations promulgated by the State of Utah, through the Division of Parks and Recreation, made it essential that an anchor be on board the boat in question and that pursuant to these rules and regulations the lack of an

anchor is evidence of negligence by the defendants.

Plaintiff's requested Instruction Number 8 contained a list of "essential" safety items as promulgated in a publication by the State of Utah through its Division of Parks and Recreation. (See Appendix A-1.) This list of "essential" safety equipment was allowed into evidence as Exhibit Number 7 without objection from defendants. Plaintiff maintains that this list constitutes a safety standard, the deviation from which constitutes negligence.

In Wheeler v. Jones, 19 Utah 2d, 392, 431 P.2d 985 (1967), the plaintiff sued for injuries which he had received as a result of colliding with a glass sliding door owned and maintained by defendants. Plaintiffs were allowed to enter into evidence F.H.A. regulations on the necessity of having either safety glass or a horizontal metal bar in the door. The Utah Supreme Court allowed the evidence, holding that it was "one of the standards of the community in determining whether or not the defendants were negligent." (Emphasis added). The court in Wheeler continued by stating:

While it is true that the weight of authority is against allowing regulations such as those of F.H.A. to be given in evidence, yet there is a respectable authority permitting such evidence to be received. [Citations omitted].

431 P.2d at 987.

In Sage v. Northern Pacific Railway Company, 380 P.2d 856 (Wash. 1963), the administratrix of decedent's estate maintained a wrongful death action against defendants as a result of a collision which claimed the decedent's life. The Supreme Court of Washington held that plaintiff was entitled to introduce as evidence certain safety standards which were contained in a

booklet promulgated by the National Safety Council.

A trend exists in the law which allows codes or standards of safety issued or sponsored by governmental bodies to be admitted into evidence on the issue of negligence. As evidenced by the decision in Wheeler, Utah is among the minority that allows such codes and safety standards to be introduced into evidence.

Annot., 78 ALR 2d 778 §3(b)(1961)(cases cited in, Later Case Service 1975).

In the instant case, plaintiff established by introduction of Exhibit 7, that safety regulations exist in the State of Utah which would make an anchor an essential piece of equipment on board the boat in question. Based on the authority in Wheeler and the safety standards promulgated by the Utah Division of Parks and Recreation, the lack of an anchor on the boat in question was evidence of negligence on the part of the defendants.

Plaintiffs requested Instruction Number 8 concerned the specific safety regulations promulgated by the Utah Division of Parks and Recreation. Since the safety equipment list was introduced into evidence without objection, it was error for the court not to give plaintiff's Instruction Number 8 in order to allow the jury to properly evaluate the evidence.

The court's failure to give an appropriate instruction on plaintiff's theory that an anchor was required aboard the boat constitutes prejudicial error.

CONCLUSION

Plaintiff proceeded in this action against the named defendants on the theory that, the defendants were vicariously liable

for the negligence of Kevin Wistesen, a minor son of one of the defendants. Plaintiff presented this theory at trial, along with evidence to support the theory. Plaintiff was, therefore, entitled to have an instruction given to the jury which would adequately inform the jury of plaintiff's theory of the case. The Court failed to give such an instruction on the imputed liability of the defendants and such failure constituted prejudicial error.

The plaintiff was substantially prejudiced by the erroneous admission of evidence inferring alcohol consumption by the decedent, Evan Pearce. The alleged consumption, if any, was remote in time, totally irrelevant, without any probative value and offered for the sole purpose to inflame and prejudice the jury against the decedent, Evan Pearce. Plaintiff made a motion in limine with respect to such evidence, which motion the Court denied. Plaintiff also made timely objections when such evidence was introduced at trial. Defendants totally failed to show that the deceased, Evan Pearce, at the time of the accident, was intoxicated or otherwise influenced or debilitated from the consumption of alcohol. Defendants also conceded that they would be unable to make such a showing based on the testimony they would offer at trial. To further compound the inadmissibility and prejudicial effect of the evidence, defendants were allowed to introduce evidence that the decedent, Evan Pearce, illegally purchased the alcoholic beverages. It goes without saying that such evidence is inadmissible. It was egregiously inflammatory and was introduced only to demean and impugn the reputation of the decedent in the eyes of the jurors. The Court's failure to


grant plaintiff's motion in limine was prejudicial error and grounds for reversal.

Utah case law establishes the presumption that a person exercises due care for his or her own safety. This presumption should be presented to the jury in the form of an instruction even if the other party presents evidence which runs contra to the presumption as long as reasonable minds might differ as to the conclusions to be drawn from such evidence. In the instant case, the evidence offers every indication that the decedent, Evan Pearce, made very conceivable effort and exercised all due care to secure his own safety. The Court did not give either plaintiff's requested instruction on the presumption or an equivalent instruction. The Court's failure to so instruct the jury constituted error.

Plaintiff presented evidence in support of the theory, that Utah law required an anchor to be aboard the boat in question. Plaintiff also presented evidence that the State of Utah, through its Division of Parks and Recreation, has promulgated and published rules and regulations which make an anchor an essential item of safety equipment on a boat such as the one in question. Plaintiff submits that the lack of an anchor on board the defendants' boat was a departure from these rules and regulations and as such, was evidence of negligence. Again, plaintiff maintains that he was entitled to have his theory submitted to the jury and the failure of the Court to instruct the jury in that theory constitutes prejudicial error.


Respectfully submitted this 12th day of July, 1982.


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MAILING CERTIFICATE

MAILED 2 copies of the foregoing Brief of Appellant to Mr.
Darwin C. Hansen, HANSEN & SPRATLEY, Attorneys for Defendants-
Respondents, P.O. Box 489, Bountiful, Utah 84010, this 12th day
of July, 1982.


SECRETARY

You are instructed that the State of Utah, through its Division of Parks & Recreation, has approved a list of essential equipment for safe boating. That list is as follows:

Equipment for Safety Afloat

Items E = essential D = desirable	Class A (to 15')			Class 1 (16' to 25')			Class 2 (26' to 40')			Class 3 (40' to 65')		
	Open water	Semi-protected	Protected	Open water	Semi-protected	Protected	Open water	Semi-protected	Protected	Open water	Semi-protected	Protected
Anchor, cable (line, chain, etc.).....	E	E	E	E	E	E	E	E	E	E	E	E
Bailing device (pump, etc.).....	E	E	E	E	E	E	E	E	E	E	E	E
Boat hook.....	..	..	..	D	D	D	E	E	E	E	E	E
Bucket (fire fighting/bailing).....	E	E	E	E	E	E	E	E	E	E	E	E
Compass.....	E	E	D	E	E	D	E	E	E	E	E	E
Distress signals.....	E	E	E	E	E	E	E	E	E	E	E	E
Emergency drinking water.....	E	D	..	E	D	..	E	D	..	E	D	..
Fenders.....	D	D	D	D	D	D	D	D	D	D	D	D
First-aid kit and manual (10- to 20-unit).....	E	E	E	E	E	E	E	E	E	E	E	E
Flashlight.....	E	E	E	E	E	E	E	E	E	E	E	E
Heaving line.....	..	..	..	..	..	..	D	D	D	D	D	D
Light list.....	D	D	..	E	E	D	E	E	E	E	E	E
Local chart(s).....	E	D	..	E	E	E	E	E	E	E	E	E

	Class A (to 15')			Class 1 (16' to 25')			Class 2 (26' to 40')			Class 3 (40' to 65')		
	Open water	Semi-protected	Protected	Open water	Semi-protected	Protected	Open water	Semi-protected	Protected	Open water	Semi-protected	Protected
Mirror (for signaling).....	D	D	..	D	D	..	D	D	..	D	D	..
Mooring lines.....	E	E	E	E	E	E	E	E	E	E	E	E
Motor oil and grease (extra supply).....	..	..	..	D	D	D	D	D	D	D	D	D
Oars, spare.....	E	E	E	E	E	E	..	..	..	..	..	..
Radio direction finder.....	..	..	..	D	..	..	D	..	..	D	..	..
Radio, telephone.....	D	..	..	D	D	..	D	D	..	D	D	..
Ring buoy(s) (additional).....	D	D	D	D	D	D	D	D	D	D	D	D
Shear pins (if used).....	E	E	D	E	E	D	..	..	..	..	..	..
Depth sounding device, (lead line, etc.).....	D	D	..	D	D	D	E	E	E	E	E	E
Spare batteries.....	D	D	D	D	D	D	D	D	D	D	D	D
Spare parts.....	E	D	..	E	E	D	E	E	D	E	E	D
Tables, current.....	..	..	..	..	..	..	..	D	D	..	E	E
Tables, tide.....	..	..	D	..	..	D	..	D	D	..	E	E
Tools.....	E	D	..	E	E	D	E	E	D	E	E	D

You may use the above developed list for the purpose of determining whether the boat, which is involved in this litigation, was properly equipped for safe operation, and whether in your opinion, the failure to have any of said equipment on the boat was the proximate cause of the death of Evan Pearce.